

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;)	CIVIL NO. CV03-00385 SOM-LEK
)	(Copyright)
Plaintiff,)	
vs.)	DECLARATION OF LEX R. SMITH
)	
HAWAIIAN EXPRESS SERVICE,)	
INC., et al.,)	
)	
Defendants.)	
)	
)	
)	

DECLARATION OF LEX R. SMITH

1. I am an attorney licensed to practice law before this Court.
2. Attached hereto as Exhibit "A" are true copies of pages from the March 2002 deposition of Mark Dillon.
3. Attached hereto as Exhibit "B" are true copies of pages from the trial transcript dated February 28, 2003 containing the testimony of Mr. Ralph Stussi in Mr. Berry's lawsuit against Fleming.
4. Attached hereto as Exhibit "C" are true copies of pages from the trial transcript in the instant action dated March 1, 2006 and reflecting trial testimony of Mr. Brian Christensen.

5. In December of 2004, I was present at the deposition of Brian Christensen in this case when he testified that he became Hawaii Division President in March of 2003. I did not recall that thirty-two months earlier (in March of 2002) Tim Hogan, Wayne Berry and I were all present at a deposition in which Mr. Mark Dillon testified that as of March 2002 Brian Christensen was the boss at Fleming's Kapolei offices.

6. I also did not recall that my bills (which have been in Mr. Hogan's possession for the past three years) also reflected that they were addressed to Brian Christensen beginning in mid-2002.

7. To the best of my recollection, I had very little contact with Mr. Christensen regarding Wayne Berry's copyright lawsuit that was filed in 2001 and went to trial in 2003, Berry v. Fleming, Civil No. Civil No. CV 01 00446 SPK LEK.¹ My contacts at Fleming for dealing with that case were Ralph Stussi and Fleming lawyers in Oklahoma City and Houston Texas. Ralph Stussi attended the trial in Honolulu, in March of 2003 as Fleming's

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¹ I became acquainted with Mr. Christensen in 2000 when he was head of sales for Fleming Hawaii. Wayne Berry had induced the Honolulu Advertiser to run a series of stories accusing Fleming of single-handedly controlling the cost of groceries in Hawaii and overcharging the public. I was introduced to Mr. Christensen when he and I (together with other Fleming personnel) attended a meeting with Foodland and explained the falsity of the accusations. Shortly thereafter, the reporter and editor who were responsible for the false accusations left the Advertiser.

representative. To the best of my memory. Mr. Christensen had no material involvement in the preparation or trial.

DATED: Honolulu, Hawaii, June 6, 2006.

/s/ *Lex R. Smith*
LEX R. SMITH